

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOHN R. GRAHAM

Claimant

VS.

HOME LUMBER & SUPPLY CO. INC.

Respondent

AND

INDIANA LUMBERMENS MUTUAL INS.

Insurance Carrier

Docket No. **258,883**

ORDER

Claimant requests review of a preliminary order entered by Administrative Law Judge Nelsonna P. Barnes on February 6, 2001.

ISSUES

The Administrative Law Judge determined that the claimant failed to prove that he gave notice to the respondent within ten days of the alleged injury. The Administrative Law Judge further determined that the claimant failed to establish just cause for extending the 10-day notice requirement to 75 days.

The issue listed on the claimant's application for review is whether timely notice was given.

FINDINGS OF FACT

Having reviewed the evidentiary record compiled to date, the Board makes the following findings of fact:

The claimant has alleged injury to his back, right shoulder, right leg and all parts affected thereby.

The claimant was employed in August 1998 as a yardman for the respondent. His duties consisted of stocking lumber, cutting rebar, shingle and sheetrock delivery, unloading and loading trucks and keeping track of inventory.

The claimant alleges that on July 26, 2000, he made a sheetrock delivery and after unloading began to experience pain in his groin. The claimant did not report the problem to anyone at work because he thought it would go away. At home that evening the claimant felt tired and started getting chills. He was experiencing pain in his abdomen and groin. Claimant went to the emergency room that evening. When he saw Dr. Kuhns the following day, the claimant was complaining of pain from his abdomen to his groin area.

Dr. Kuhn diagnosed the claimant with fever secondary to acute bronchitis or a urinary tract infection, hematuria and the condition was complicated by underlying lymphoma. Dr. Kuhn provided a work release slip which the claimant's wife delivered to the respondent. The release, dated July 27, 2000, simply indicated that the claimant would be off work until further notice. The claimant testified that he talked to his foreman, Pat Davis, on August 12, 2000, and that they discussed the restrictions on his activities imposed by Dr. Kuhns. The claimant did not advise the foreman that the reason claimant had gone to the doctor or the physical restrictions were related to work.

CONCLUSIONS OF LAW

1. The preliminary hearing Order should be affirmed.
2. The Workers Compensation Act places the burden of proof on injured workers to establish their right to compensation.¹ And that burden is to persuade the trier of facts by a preponderance of the credible evidence that their position on an issue is more probably true than not when considering the whole record.²
3. The Workers Compensation Act requires a worker to provide the employer timely notice of a work-related accident or injury. The Act reads:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the

¹ K.S.A. 44-501(a).

² K.S.A. 44-508(g).

accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.³

According to his own testimony, the earliest the claimant could have provided notice to the respondent was during the conversation with his foreman on August 12, 2000, which is beyond the ten-day notice period. In any event, the claimant agrees that he did not advise his foreman during that conversation that he was seeking medical attention in relation to an incident at work.

K.S.A. 44-520 provides that notice may be extended to 75 days from the date of accident if claimant's failure to notify respondent under the statute was due to just cause. In considering whether just cause exists, the Board has listed several factors which must be considered:

- (1) The nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually.
- (2) Whether the employee is aware he or she has sustained an accident or an injury on the job.
- (3) The nature and history of claimant's symptoms.
- (4) Whether the employee is aware or should be aware of the requirements of reporting a work-related accident and whether the respondent had posted notice as required by K.A.R. 51-13-1.

In this instance, claimant's accident was a sudden and traumatic event on or about July 26, 2000, which caused him significant pain. There was no further evidence presented regarding the claimant's failure to report the accident. There is mention in the record that claimant had prior workers compensation claims against the respondent which

³ K.S.A. 44-520.

arguably indicates that claimant was aware of the requirement to report a work-related accident.

4. Claimant has failed to prove that he provided the respondent with timely notice of the alleged accidental injury. Additionally the record contains no just cause to extend the notice time to 75 days. Therefore, the request for benefits should be denied.

5. As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing of the claim.⁴

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Nelsonna P. Barnes dated February 6, 2001, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April 2001.

BOARD MEMBER

Copies to:

Joseph Seiwert, Claimant's Attorney
Frederick L. Haag, Respondent's Attorney
Nelsonna P. Barnes, Administrative Law Judge
Philip S. Harness, Workers Compensation Director

⁴ K.S.A. 44-534a(a)(2).